

The Bribery Act-A Change in the Name Affects the Game

The UK Bribery Bill is just over one week old and there has been a plethora of commentary on it. Indeed this commentator has received, and read, several helpful comments from his UK counterparts over the past week. This blog has had several posting on the legislation, both pre and post law. See [here](#), [here](#) and [here](#). This posting will list some of the highlights and insights into what has been posted over the past couple of weeks.

What's in a Name?

TFoxlaw does not yet have a full appreciation of some of the subtleties of the British legislative process so the first thing that must be reported is that as the Bribery Bill was passed by Parliament and received the Royal Assent it is now law therefore it must be referred to as the Bribery *Act*. In other words, to continue to refer to it as the Bribery *Bill* is no longer correct. So, for those of you keeping score at home, please edit your score cards.

Is it a Game Changer?

This is not only a significant question for UK companies but also US companies with UK subsidiaries or a UK presence. So for both UK and US companies the answer is yes, the Bribery Act is a significant game changer. White and Case, in a client memorandum in April, 2010, notes that the Act changes the law for UK companies in the following areas:

- The extra territorial scope of the Act;
- The liability of senior officers;
- The corporate liability offence;
- The illegality of facilitation payments;
- The illegitimacy of payments to both foreign public officials and non-public officials; and
- The potential of debarment from public procurement contracts.

However, these changes can be just as dramatic for US companies with a UK presence so almost every US company with international operations has either a UK presence or a UK subsidiary therefore the answer is most probably yes, the Bribery Act is a game changer for US companies as well.

A new PM could ring in change?

For those of you who are not following the international section in your newspaper, there is an upcoming election in the UK. All Parliament seats are up for grabs and the party garnering the most seats will come to power, subsequently selecting the next Prime Minister. How does this impact the Bribery Act? It will affect the Bribery Act through the only affirmative defense set forth in the Act, which is the ‘adequate procedures’ defense. The Explanatory Notes to the Bribery Act indicate that this narrow defense would allow a corporation to put forward credible evidence that it had adequate procedures in place to prevent persons associated from committing bribery offences.

The legislation requires the Minister of State for Justice to publish guidance on procedures which relevant commercial organizations can implement to prevent bribery by persons associated with their entity. It was not originally anticipated that the Minister of Justice’s guidance on the Bribery Act, or the affirmative defense of ‘adequate procedures’, would not be published until the fall, most likely October as reported to this commentator.

Initially this means that it is likely that there will be a lengthy period where prosecutions are unlikely. Additionally, with the upcoming elections, there may be a change in government from Labour to the Tories or even to the Lib Dems. If the pro-business Tory party returns to power this could have implications for the guidance, as could a hung parliament. However, a coalition government of Labour/Lib Dems (or even a Lib Dem lead coalition) could well result in more restrictive language around the ‘adequate procedures’ defense.

So there may be more questions than answers at this point and the best guidance we can offer is “Watch this Space”.

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